

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
:
UNITED STATES OF AMERICA
:
Plaintiff, S14 11 Cr. 1091 (VM)
:
- against - (Electronically Filed)
:
PETER LESNIEWSKI
:
Defendant.
-----X

DEFENDANT PETER LESNIEWSKI'S PROPOSED REQUESTS TO CHARGE

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Introduction

This submission contains defendant Dr. Peter J. Lesniewski's position regarding Requests to Charge. The government yesterday filed those Requests to Charge upon which the parties – the government and all three defendants – are in agreement. This submission presents the following:

- (1) Dr. Lesniewski's proposed versions of those Requests to Charge that the government's submission notes are not subject to agreement among the parties (Requests #4, 6, 7, 10, 13, 16, 18, 53, 58 & Conclusion) in the government's submission). As set forth below, the Dr. Lesniewski's proposed Requests are in the form of "track changes" versions for each Request that provide that government's proposed Request along with those changes and deletions proposed by Dr. Lesniewski;
- (2) Dr. Lesniewski's proposed substitute Request to Charge with respect to Cooperating Witnesses (Request #52 in the government's submission);
- (3) Dr. Lesniewski's objection to specific charges, namely, a vicarious liability charge for certain substantive charges [the *Pinkerton* charge, *Pinkerton v. United States*, 328 U.S. 640 (1946)], and any other instructions in which *Pinkerton* language appears, and any charge regarding "motive;"
- (4) Dr. Lesniewski's request that reference be made to the "good faith" instruction (Request #18 in the government's submission) at the conclusion of each of the following instructions relating to the fraud counts: Requests #23 & 28;
- (5) Dr. Lesniewski's objection to two aspects of the government's proposed charge regarding venue (Request #42): (a) that the language "the water surrounding

Long Island is treated as being in the Southern District of New York as well as in the Eastern District of New York” be deleted because it is not applicable to this case; and (b) that the government be required to prove venue beyond a reasonable doubt (and not merely by a preponderance of the evidence) because venue is a fact essential to any finding of guilt, and all such facts must be proved to a jury’s satisfaction beyond a reasonable doubt. *See, e.g., United States v. Booker*, 543 U.S. 220, 244 (2005) (“any fact . . . which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt”). *See also In re Winship*, 397 U.S. 358, 364 (1970) (“the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged”); *United States v. Boney*, 572 F.2d 397, 400 (2d Cir. 1978) (“the Government bears the burden of proving venue as an essential element of its case”); *United States v. Gross*, 276 F.2d 816, 819 (2d Cir.1960), *quoting United States v. Jones*, 174 F.2d 746, 748 (7th Cir. 1949) (venue is an “essential part of the government’s case. Without it, there can be no conviction”); *United States v. Provodo*, 215 F.2d 531, 537 (2d Cir. 1954); (venue “must be proved like any other material allegation of the Indictment”); and

- (6) Dr. Lesniewski’s position that discussion regarding the following charges be deferred until after presentation of the evidence at trial:

defense contentions

negligence of victim

Pinkerton

conscious avoidance

defendant's testimony

non-testifying defendant

uncalled witness(es)

subpoenas must be obeyed

Request No. 14:

Conspiracy: Purpose of the Statutes

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As I said, Counts One through Four each charge a conspiracy to violate the law of the United States. A conspiracy is a kind of criminal partnership -- a combination or agreement of two or more persons to join together to accomplish some unlawful purpose.

The crime of conspiracy is an independent offense. It is separate and distinct from the violation of any specific federal laws, which the law refers to as "substantive crimes."

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If a conspiracy exists, even if it should fail in its purpose, it is still punishable as a crime. Indeed, you may find a defendant guilty of conspiracy to commit an offense even though the substantive crimes which were the object of the conspiracy were not actually committed. ~~Congress has deemed it appropriate to make conspiracy, standing alone, a separate crime, even if the object of the conspiracy is not achieved. This is because collective criminal activity poses a greater threat to the public's safety and welfare than individual conduct, and increases the likelihood of success of a particular criminal venture.~~

1349 Conspiracy: Elements of Conspiracy

In order for you to find a particular defendant guilty of conspiracy in violation of 1349, the Government must prove beyond a reasonable doubt each of the following essential elements as to that defendant:

First, that the conspiracy charged in the Indictment existed; that is, that there was an agreement or understanding to commit a federal crime.

Second, that the defendant knowingly became a member of that conspiracy with knowledge of its unlawful objective.

Third, that the defendant participated in the conspiracy willfully and intentionally.

Now let us separately consider the ~~two~~three elements.

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Request No. 27:

1349 Conspiracy: First Element - Existence of Agreement

Now let me talk separately about each of the three elements. The Government must first prove beyond a reasonable doubt the existence of the conspiracy. In other words, it must prove an unlawful agreement by two or more people to commit at least one of the three objectives charged in the Indictment. The conspiracies alleged in Counts One and Two are agreements to commit mail fraud, wire fraud, and health care fraud. I'm going to talk first about what the Government must show to prove an agreement. Then I'll talk to you about those objectives.

You need not find that the alleged members of the conspiracy met together and entered into any express or formal agreement. Similarly, you need not find that the alleged conspirators stated, in words or in writing, what the scheme was, its object or purpose, or every precise details of the scheme or the means by which its object or purpose were to be committed or accomplished. What the Government must prove is that there was a mutual understanding, whether spoken or unspoken, between two or more people to cooperate with each other to accomplish an unlawful act.

You may, of course, find that the existence of an agreement to disobey or disregard the law has been established by direct proof. ~~But since a conspiracy, by its very nature,~~

~~often is characterized by secrecy,~~ You may also infer its existence from the circumstances of the case and the conduct of the parties allegedly involved. ~~In a very real sense, then, in the context of conspiracy cases, actions often speak louder than words.~~ In this regard, you may, in determining whether an agreement existed here, consider the actions and statements of all of those you find to have been participants as proof that there was a common design on the part of the persons charged to act together to accomplish an unlawful purpose.

As I mentioned to you before, if the elements of conspiracy are established, it is immaterial whether the conspirators successfully accomplished their purpose. ~~On the other hand, proof that the objects of an alleged conspiracy were accomplished may be the most persuasive evidence of the existence of the conspiracy itself. In other words, success of the venture, if you believe it was successful, and how that success was achieved, may be the best proof of the venture itself.~~

~~Usually, the only evidence available is that of disconnected acts on the part of the alleged individual conspirators, which, when taken together in connection with each other and with the reasonable inferences flowing from them, may show a conspiracy or agreement to secure a particular result as satisfactorily and conclusively as more direct proof.~~

In sum, if, upon consideration of all the evidence, direct or circumstantial, you find the government has proved beyond a reasonable doubt that at least two of the alleged conspirators agreed to work together in furtherance of the unlawful scheme alleged in the Indictment, then the first element is established.

Request No. 310:

1349 Conspiracy: Second Element - Membership in the Conspiracy

As to each conspiracy count, if you conclude that the Government has proven beyond a reasonable doubt that the conspiracy charged in the Indictment existed, you should next determine the second question, and that is whether the defendant you are considering participated in the conspiracy in furtherance of its unlawful objectives.

The Government must prove beyond a reasonable doubt that he or she knowingly and willfully entered into the agreement and agreed to take part in the conspiracy knowingly and willfully to further promote and cooperate in its unlawful objective or objectives.

"Willfully," and "Knowingly" Defined

An act is done "knowingly" if it is done voluntarily and deliberately rather than mistakenly or inadvertently.

"Willfully" means to act knowingly and purposely, with an intent to do something the law forbids, that is to say, with a bad purpose either to disobey or disregard the law.

~~Now, science has not yet devised a manner of looking into a person's mind and knowing what that person is thinking. However, you do have before you evidence of certain acts and conversations alleged to have taken place with the defendants, certain records alleged to relate to the defendants, and other~~

~~physical and testimonial evidence. The Government contends that these acts, conversations and pieces of physical evidence show beyond reasonable doubt that the defendants knew of the unlawful purposes of the conspiracy.~~

It is not necessary that a defendant you are considering be fully informed as to all the details of the conspiracy in order to justify an inference of knowledge on his or her part. To have knowledge sufficient to join a conspiracy~~sufficient guilty knowledge~~, a defendant need not have known the full extent of the conspiracy or all of its activities or all of its participants. It is not even necessary that a defendant knew every other member of the conspiracy, nor is it necessary that a defendant receive any monetary benefit from his or her participation or that he or she had a financial stake in the outcome. While proof of a financial interest in the outcome of a scheme is not essential, if you find the government has proved beyond a reasonable doubt that a defendant did have such an interest, that is a factor you may consider in determining whether the government has proved beyond a reasonable doubt he or she was a member of the conspiracy.

If you find that the defendant you are considering had some underlying motive, not in itself criminal, for any or all of his or her acts, you may nevertheless conclude that his or her conduct was willful, so long as the government has proved

beyond a reasonable doubt he or she also acted with the intent to aid or bring about the success of one or more of the alleged objects of the conspiracy. While motive is something you may consider, the Government is not required to prove motive, that is, a defendant's ultimate goal or reason for engaging in a particular course of conduct. ~~It is often very difficult, if not impossible, to ascertain why someone did something. Here, it is important not to confuse motive with intent. Motive is what prompts a person to act or fail to act. Intent refers only to the state of mind with which the act is done or omitted. If the guilt of a defendant is proven beyond a reasonable doubt, it is immaterial what the motive for the crime may be.~~

I want to caution you, however, that the knowledge requirement is not satisfied by demonstrating that the defendant was merely negligent, foolish, or mistaken.

~~The duration and extent of a defendant's participation has no bearing on the issue of the defendant's guilt. A~~

defendant need not have joined the conspiracy at the outset.

The defendant may have joined it for any any of the unlawful purposes charged at any time in its progress, and he or she will still be held responsible for all that was done before the defendant joined and all that was done during the conspiracy's existence while the defendant was a member. Each member of

Comment [JLD1]: This is the equivalent of a Pinkerton charge (explicitly included later) and we object to any Pinkerton charge in whole or in part. As a result, we object to this version of such a charge.

conspiracy may perform separate and distinct acts and may perform them at different times. Some conspirators may play major roles, while others play minor roles in the scheme. An equal role is not what the law requires. In fact, even a single knowing and willfull act may be sufficient to draw the defendant within the ambit of the conspiracy.

I want to caution you, however, that the mere association by one person with anothers does not make that person a member of the conspiracy even when coupled with knowledge that a conspiracy is taking place. Mere presence at the scene of a crime, even coupled with knowledge that a crime is taking place, is not sufficient to support a conviction. Similarly, mere association in a business or otherwise with a conspirator does not by itself make one a member of the conspiracy, although a conspiracy may exist between persons who are also associated in lawful business activities. What is necessary is that the government prove beyond a reasonable doubt the defendant you are considering participated in the conspiracy with knowledge of at least some of its illegal objects and with an intent to aid in the accomplishment of those illegal objects.

In sum, to satisfy this element, the government must prove beyond a reasonable doubt that the defendant you are considering, with an understanding of at least some of the objects of the conspiracy, must have agreed to join the conspiracy, and intentionally engaged, advised or assisted in it for the purpose of furthering at least one of those unlawful objects. Only then does a defendant become a knowing

| participant in the illegal agreement -- that is to say, a
conspirator.

Request No. 413:
371 Conspiracy: Elements

In order for you to find a particular defendant guilty of conspiracy to defraud the United States, the Government must prove beyond a reasonable doubt each of ~~four~~^{three} elements. The first ~~three~~^{two} elements are the same as they were for the conspiracies charged in Counts One and Count Two. That is, the first element is the existence of the conspiracy, although of course here the charged object of the conspiracy is to defraud the United States, ~~and~~ the second element is the defendant's knowing participation in the conspiracy's illegal objects, and third is the defendant's intentional and willful participation in the conspiracy. You should apply the same instructions and definitions I've already given you regarding those ~~three~~^{two} elements when you are considering Counts Three and Four as well.

There is a ~~fourth~~^{third} element of the conspiracy to defraud the United States charge that was not an element of the Count One and Count Two conspiracies. To establish the ~~fourth~~^{third} element, the Government must prove that any one of the conspirators, not necessarily the defendant you are considering, but any one of the parties involved in the conspiracy knowingly committed at least one overt act in furtherance of the conspiracy.

Just as with the Counts One and Two conspiracies, it is not necessary that the United States suffer a loss in order to establish the existence of a conspiracy to defraud the United States, although that could be relevant in determining whether the conspiracy existed, or whether a particular defendant participated in the conspiracy knowingly and/or willfully. And, I instruct you that the United States Railroad Retirement Board is an agency of the United States under the meaning of this conspiracy statute.

Now, let me explain in more detail the overt act element that applies to Counts Three and Four. Under the statute criminalizing conspiracies to defraud the United States, there has to be something more than an agreement, some overt step or action must have been taken by at least one of the conspirators in furtherance of the conspiracy. In other words, the overt act element is a requirement that the agreement went beyond the mere talking stage, the mere agreement stage. For Count Three, a number of overt acts are alleged in the Indictment in paragraph 43. Similarly for Count Four, a number of overt acts are alleged in the Indictment in paragraph 46. I will not read them to you now, but you will have the Indictment with you in the jury room.

But, in order for the Government to satisfy the overt act element, it is not required to prove all of the particular

overt acts alleged in the Indictment. Nor is it required that the overt act proven be alleged in the Indictment. It is enough if the Government proves that at least one overt act was knowingly committed by a conspirator in furtherance of the conspiracy. In addition, to satisfy this element, you must unanimously agree that some overt act was committed, but you need not agree unanimously on any particular overt act.

Comment [JLD2]: We would ask for a unanimity instruction with respect to the jury's determination of the overt act(s).

Similarly, it is not necessary for the Government to prove that each member of the conspiracy committed or participated in an overt act. It is sufficient if you find that at least one overt act was knowingly committed by at least one conspirator, whether the defendant you are considering or another co-conspirator to further the conspiracy. Remember the act of any one of the members of a conspiracy done in furtherance of the conspiracy becomes the act of all the other members.

Comment [JLD3]: Another incarnation of a Pinkerton instruction, to which we object.

The overt act must have been knowingly done by at least one conspirator in furtherance of some unlawful object of the conspiracy as charged in the Indictment. In this regard, you should bear in mind that the overt act standing alone may be an innocent, lawful act. ~~Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding or assisting the conspiratorial scheme.~~ You are, therefore, instructed that the overt act does

not have to be an act which in and of itself is criminal or constitutes an objective of the conspiracy.

Request No. 516:
Counts Five through Twelve:
Health Care Fraud - First Element - Scheme

The first element that the Government must establish beyond a reasonable doubt is that there was a scheme to defraud, or a scheme to obtain money or property by means of materially false or fraudulent pretenses, representations, or promises, in connection with the delivery of or payment for health care benefits, items, or services, as charged in the Indictment.

A scheme to defraud is defined as a pattern or course of conduct concerning a material matter designed to deceive.

~~You may find the existence of such a scheme if you find that the defendant conducted himself or herself in a manner that departed from traditional notions of fundamental honesty and fair play in the general business life of society.~~

A pretense, representation, statement, or promise is fraudulent if it was made falsely and with intent to deceive. To show such a scheme to defraud, however, the Government need not prove that any specific representation standing by itself was literally false. ~~Literally true statements can form the backbone of a scheme to defraud.~~ That is because a representation, statement, claim or document may also be fraudulent if the defendant has a duty to disclose and the statement it contains only half-truths or if it conceals

material facts in a manner that makes what is said or represented deliberately misleading or deceptive. Likewise, the expression of an opinion voiced with an intent to deceive ~~not honestly-entertained~~ may constitute false or fraudulent representations under the statute.

The deception need not be premised upon spoken or written words alone. The arrangement of the words, or the circumstances in which they are used may convey a false and deceptive appearance. If there is intentional deception, the manner in which it is accomplished does not matter.

A scheme to defraud or a fraudulent representation only satisfies this element if it relates to a material fact or matter. A material fact is one that would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision. This means that if you find a particular statement of fact to have been false, you must determine whether that statement was one that a reasonable person might have considered important in making his or her decision. The same principle applies to fraudulent half-truths or omissions of material facts necessary to make the statements that were made not materially misleading.

~~While the Government must show that the false or fraudulent statement was material as I have just explained, it~~

~~is unimportant whether a victim might have discovered the fraud if it had probed further.~~ The alleged victim of the health care fraud counts is the health insurer, and the alleged victims of the mail and wire fraud counts are the RRB and private disability insurers. ~~If you find that a scheme or artifice to defraud existed, it is irrelevant whether you believe that any of the victims involved in this case were careless, gullible, or even negligent.~~ Furthermore, if a person provides knowingly and intentionally provides false information about material facts in order to obtain property, it is not a defense to fraud that the person would have obtained the money or property that is the target of the scheme had they provided entirely truthful information.

The Government is not required to prove that the defendant personally originated the scheme to defraud. Furthermore, it is not necessary that the Government prove that the defendant actually realized any gain from the scheme or that the intended victim actually suffered any loss. But, the goal of the scheme must be to obtain money or property by fraud and deception. ~~In this case, it so happens that the Government does contend that the proof establishes that victims were defrauded and that the defendants profited.~~ Although ~~w~~Whether or not the scheme actually succeeded is really not the question, you may consider whether it succeeded in determining whether the scheme existed, just as you may consider whether a fraud was even necessary to obtain the money or property. A scheme to defraud need not be shown by direct evidence, but may be established by all of the circumstances and facts in the case.

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Request No. 618:Good Faith
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Since an element of the crimes charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of health care fraud or mail fraud or wire fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on the Government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt. If a defendant believed in good faith that the representations were true, no matter how inaccurate they may turn out to be, there would be no crime.

However, if a defendant knew that his or her representations were false and material, it is not a defense that he or she believed that the victim would recognize their falsity and decide not to rely on those statements. ~~In other words, a belief by a defendant, if such belief existed, that ultimately everything would work out so that no one would lose any money does not mean that the defendant acted in good faith.~~

~~No amount of honest belief on the part of a defendant that the scheme would result only in payments that were deserved will excuse fraudulent actions or false representations made by that defendant, if the defendant had the specific intent to harm his or her victims by depriving them of accurate information that was material to their discretionary decisions about whether to pay benefits.~~

Good faith is an absolute defense to the charges in Count One of the indictment since good faith on the part of a defendant is inconsistent with intent to defraud or willfulness which is an

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essential part of the charges. The burden of proof is not on a defendant to prove good faith, of course, since a defendant has no burden to prove anything. The Government must establish beyond a reasonable doubt that the defendant acted with specific intent to defraud as charged in the indictment.

One who expresses an honestly held opinion, or an honestly formed belief, is not chargeable with fraudulent intent even though the opinion is erroneous or the belief is mistaken; and, similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent.

United States v. Rossomando, 144 F.3d 197 (2d Cir. 1998)
2 L. Sand, et al., MODERN FEDERAL JURY INSTRUCTIONS at 8-2 (2003) (modified); 11th CIRCUIT PATTERN JURY INSTRUCTIONS – CRIMINAL 16 (1997). See also *United States v. Goss*, 650 F.2d 1336, 1344-45 (5th Cir. 1981).

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Request No. 53:
Particular Investigative Techniques Not Required
[If Applicable]

—————You have heard reference, in the arguments of defense counsel in this case, to the fact that certain investigative techniques were used by the Government and certain other investigative techniques were not used. There is no legal requirement that the Government prove its case through any particular means. ~~While you are to consider carefully the evidence adduced by the Government, you need not speculate as to why they used the techniques they did, or why they did not use other techniques. The Government is not on trial, and law enforcement techniques are not your concern.~~

—————Your concern is to determine whether or not, on the evidence or lack of evidence, the defendant's guilt has been proved beyond a reasonable doubt.

Request No. 758:
General Instructions:
Sympathy - Oath As Jurors

Under your oath as jurors you are not to be swayed by sympathy or prejudice. You are to determine whether the government has proved beyond a reasonable doubt whether the ~~guilt of the~~ defendant you are considering is guilty solely on the basis of the evidence or lack of evidence and subject to the law as I have charged you.

Conclusion

Your function now is to weigh the evidence in this case and to determine the guilt of the defendants with respect to the charges of the Indictment.

You must not be influenced by any assumption, conjecture or sympathy or any inference not warranted by the facts. Your concern is to determine whether or not, with respect to each count on the evidence before you, the government has provide beyond a reasonable doubt the guilt of the defendant you are considering. ~~has or has not been proved beyond a reasonable doubt.~~

If you ~~fail to find~~ the government has not provided a defendant's guilt beyond a reasonable doubt, ~~that the law has been violated by the defendants,~~ you ~~should not hesitate for any reason to~~ must return a verdict of acquittal, that is, of not guilty. But, on the other hand, if you should find that the government has proved beyond a reasonable doubt that the defendant you are considering has violated the law ~~has been violated as charged,~~ you should not hesitate because of sympathy or for any other reason to render a verdict of guilty.

I remind you, as I have on numerous occasions during the course of my instructions to you, in considering the case

in its entirety, you must carefully consider the evidence as to each element of each count with respect to each defendant.

When you retire to the jury room, your first order of business will be to elect a foreperson. If during your deliberations you wish to see any exhibit, the procedure is as follows: You'll be in the jury room and a United States Marshal will be immediately outside the jury room. If you wish to see an exhibit, the foreperson should simply write a note, knock on the door, hand it to the marshal, and the court will respond by sending in the requested exhibit. All notes from the jury should be signed by the foreperson. Similarly, if in the course of your deliberations, your recollection on any part of the testimony should fail, or you should find yourselves in doubt concerning my instructions to you on the law, you should simply write a note, knock on the door, and hand it to the marshal. Please try to be as precise and descriptive as possible when asking for materials.

Now, in the course of writing to the court, you should not disclose how you stand or what your vote on any issue may be. In other words, sometimes the jurors send in a note which indicates how they are divided in their votes. That is a matter for you and for you alone, and so I ask that you not disclose that information in any note to the court.

It is your duty as jurors to consult with one another and to deliberate with a view toward reaching an agreement. You may only deliberate when all jurors are present. Each of you must decide the case for himself or herself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced it is erroneous.

Your verdict must be unanimous, but you are not bound to surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors.

Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard to prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be most in accordance with the truth.

Finally, I say this not because I believe it is necessary, but because it is a tradition in our court, I advise the jurors to be polite and respectful to each other so that in the course of your discussions in the jury room each juror may have his or her positions made clear. The manner in which you conduct your deliberations is wholly in your discretion. You may follow any procedure you choose, provided that each juror is given an ample opportunity to express his or her views and that

you only deliberate as a full jury. In that way, ~~if~~^{when} you do reach a verdict, you will know that it is a just one, made with the full participation of all jurors, and that you have faithfully discharged your oath, which is to decide the case without fear or favor, solely in accordance with the evidence and the law.

I will add, ladies and gentlemen, that your foreperson will be given a verdict form on which you are to record your verdict. I caution you that the short descriptions of the charges here are merely for your convenience and they're not in any way to take the place of these very detailed instructions that we've just been through. So that will be sent in to you as soon as you start.

Ladies and gentlemen, now would you give me a moment or two to consult with the lawyers to be sure that there aren't any other items that I forgot or otherwise read incorrectly.

Conclusion

Accordingly, for all the reasons set forth above, it is respectfully submitted that the Court adopt Dr. Lesniewski's Proposed Requests to Charge.

Dated: 9 July 2013
New York, New York

Respectfully submitted,

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